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Zoning: Building Permits -- Effect of Pending or Subsequently Proposed and Enacted Legislation on Applications for Building Permits

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Zoning

BUILDING PERMITS — EFFECT OF PENDING OR SUBSEQUENTLY PROPOSED AND ENACTED LEGISLATION ON APPLICATIONS FOR BUILDING PERMITS

Introduction

The rush to the suburbs and the present trend of urban redevelopment, with the resultant increase in building activity, have greatly heightened interest in zoning. Suburbs use zoning as an instrument to protect those qualities which attracted people there in the first place, and the proposal of a motel, a service station or a trailer camp is often a modern "call to arms." Cities which have spent, or plan to spend, large amounts of money in redevelopment use zoning as an instrument to insure the permanancy of the proposed changes. Either attempt to so use zoning can give rise to a situation in which a governing authority or a court must decide whether to grant a building permit on the basis of an application which does not conform to (1) legislation pending at the time of application, or (2) legislation proposed and enacted after application was made, although the application conformed with then-existing law.

The Nature and Scope of the Problem

The problem arises in two different situations. The first occurs when a municipality proposes a more restrictive zoning ordinance or building code.[1] The immediate result is a rash of applications for permits to erect buildings which conform to the existing law but which do not conform to the pending legislation, in an obvious effort to perpetuate the very things the legislature has deemed necessary to eliminate in the interest of the public health, morals and welfare.[2] Can the municipality deny the permits on the basis of the proposed legislation or must the permits be granted because the applications conformed to the existing law?

The second situation originates when an application for a permit to build something the residents do not want reveals that the municipality's zoning ordinance or building code does not prohibit the intended use.[3] Can the municipality amend the existing law so as to prohibit the intended use and deny the building permit on the basis of the law as amended subsequent to the application?[4]

Neither of these problems is limited to municipalities of any particular size, and both may arise wherever zoning ordinances and building codes are utilized. However, the first is more common in larger municipalities while the second is typical of smaller suburban areas. Although the problems are similar in many respects, they have one distinguishing element. In the first situation, there is legislation already pending at the time of application which would prohibit the intended use. Thus the proposed change of the official mind is a matter of record, and the applicant is thereby forewarned. In the second, there is no legislation pending at the time of application. Thus the change of the official mind is not a matter of record and the element of advance notice is missing. Should this distinction be the determining consideration in deciding that an applicant in one situation should have a permit while an applicant in the other situation should not? Outside of Pennsylvania,[5] it apparently makes no difference.[6]

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1 Building codes, like zoning ordinances, are an exercise of the police power. 7 MCQUILLIN, MUNICIPAL CORPORATIONS § 24.505 (3rd ed. 1949). The two differ in that building codes usually regulate the structural details of the individual buildings while a zoning ordinance regulates the type of building to be erected in a particular location. This distinction does not affect any discussion contained herein, nor should any distinction be made between the two as to the effect of pending legislation or subsequently-proposed and enacted legislation on applications for building permits. *Compare* Rohrs v. Zabriskie, 102 N.J.L. 473, 133 Atl. 65 (Sup. Ct. 1926) (building code) *with* Koplin v. Village of South Orange, 6 N.J. Misc. 489, 142 Atl. 235 (Sup. Ct. 1928) (zoning ordinance). This was done in Eastern Blvd. Corp. v. Willaret, 123 N.J.L. 269, 8 A.2d 688 (Ct. Err. & App. 1939).

2 Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D. Va. 1932).

3 Vine v. Zabriskie, 122 N.J.L. 4, 3 A.2d 886 (Sup. Ct. 1939).

4 This problem is clearly set out in Rohrs v. Zabriskie, 102 N.J.L. 473, 133 Atl. 65 (Sup. Ct. 1926).

5 See text at notes 21-23, *infra.*

6 See text at note 38, *infra.*

The basic problem in both situations may be posed in one question: Does application for a building permit vest any rights in the applicant so that a permit may not be denied on the basis of legislation pending at the time of application, or legislation proposed and enacted after application?

Vested Rights in Existing Legislation

The constitutional rights of a citizen do not include any right to have rules of law remain unchanged for his benefit.[7] Consequently, if the law upon which a trial court decision was based is changed during the pendency of an appeal, the appellate court must apply the changed law.[8] But while no vested right can be obtained in the continuance of rules of law, it is possible to acquire a vested right under existing laws which will immunize the holder from subsequent legislation. Thus, a substantial change of position, such as expenditures of $4000 on a structure to cost between $25,000 and $30,000, will vest a right to continue erecting a building which conformed to the law existing at the time the project was begun even though the structure does not conform to a subsequently-enacted law.[9]

Application for a building permit and the things that must necessarily precede it, such as the preparation of plans, surveys, etc., involve to some degree a change of position, sometimes with considerable financial outlay, rather than mere reliance upon the continuance of existing law. But should mere application, as opposed to actual construction, vest any rights?

The probable answer to this question can be seen in *Ziffrin, Inc. v. United States*[10] which, while not directly in point, is closely analogous. In this case, five years after application was made for a permit to continue designated contract carrier operations, and one year after the law was amended rendering the application invalid, the Interstate Commerce Commission denied the permit, notwithstanding the fact that for four years the applicant had been entitled to the permit under the then-existing law. In upholding the denial, the Supreme Court of the United States reaffirmed the rule requiring an appellate court to apply changes in the law which occur between the trial court decision and the appeal, and held that the law existing at the time of decision on the application, rather than the law existing when the application was made, must govern (seemingly no matter how long the decision had been delayed). To require otherwise would mean that permits would be issued "contrary to the existing legislation."[11]

The question whether application for a permit vests any rights has been answered directly: "No vested right is created simply by application for a building permit."[12] Strict application of this rule, or the rule requiring an appellate court to enforce the law existing at the time of decision on appeal, would readily solve the entire problem under discussion. A municipality could simply fail to issue a permit and then enact an ordinance prohibiting the intended use. As long as the prohibition was a reasonable exercise of the police power, a court would enforce the new law, even if it was enacted just prior to the final appellate court decision. However, the final answer is not this simple, and it remains to examine the different situations individually.

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7 Middleton v. Texas Power & Light Co., 249 U.S. 152, 163 (1919); New York Central R.R. v. White, 243 U.S. 188, 198 (1917); Fallon v. Illinois Commerce Comm'n, 402 Ill. 516, 84 N.E.2d 641, 645 (1945).

8 Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941).

9 Miller v. Dassler, 155 N.Y.S.2d 975, 978 (Sup. Ct. 1956). *Accord*, Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843, 848 (1956); City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Deer Park Civic Ass'n v. City of Chicago, 347 Ill. App. 346, 106 N.E.2d 823 (1952).

10 318 U.S. 73 (1942). The analogy between this case and the problem under discussion is made stronger by the fact that it has been cited as authority for refusing to compel issuance of a building permit when application was made before the law was changed. Socony-Vacuum Oil Co. v. Mount Holly Township, 135 N.J.L. 112, 51 A.2d 19, 23 (Sup.Ct. 1947).

11 *Id.* at 78.

12 Haussman v. Oatley, 285 App.Div. 832, 137 N.Y.S.2d 41, 43 (App.Div. 1955). *Accord*, Shender v. Zoning Board of Adjustment, 388 Pa. 265, 131 A.2d 90, 92 (1957); Appeal of A. N. "Ab" Young Co., 360 Pa. 429, 61 A.2d 839, 840 (1948).

Legislation Pending at the Time of Application and Denial

A municipality, having commenced the necessary preliminaries and hearings attendant to adoption or amendment of a zoning ordinance, of necessity must have a right to prevent the erection of buildings which will not conform to the proposed legislation.

> Otherwise, any movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between the property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities — like locking the door after the horse is stolen.[13]

Attempts to achieve this protection have been made by enacting a "stop-gap" or "interim" ordinance in an effort to maintain the status quo until the proposed ordinance is enacted. Such attempts, because they involve legislation enacted prior to application, are outside the scope of this note.[14]

The rule requiring courts to apply existing law, rather than that which existed at the time of application, however, permits a municipality faced with an application for a permit to erect a building, which does not conform with pending legislation, to achieve this protection in the absence of an interim ordinance by simply refusing the permit. Judicial authority may permit such action or it may be arbitrary and without authorizing precedent. If the pending legislation is later enacted and the courts of the jurisdiction apply the new law despite the unauthorized action of the municipality, the end result is the same — the applicant never gets his permit.[15] However, if the municipality is given authority in the first instance to deny permits which do not conform to pending legislation, subsequent judicial application of the new law is not tantamount to official sanction of arbitrary action which leaves the applicant remediless between two opposing rules of law. This has been accomplished by judicial decision in Pennsylvania.

Under the Pennsylvania rule, a municipality, having proposed a new or amendatory zoning ordinance, may refuse to issue building permits on applications submitted before the new ordinance is enacted if the applications do not conform to the proposed legislation.[16] It makes no difference that this refusal occurs before the legislation is enacted,[17] as long as the proposed legislation which is the basis for the denial be actually pending at the time of application,[18] *and later enacted.*[19] The Supreme Court of Pennsylvania, re-examining the decisions which gave rise to this rule, concluded:

> In view of the foregoing decisions, it will hardly be denied that a muncipality may properly refuse a building permit for land use repugnant to a pending and later enacted zoning ordinance even though application for the permit is made when the intended use conforms to existing regulations. . . .[20]

The Pennsylvania rule appears to stress judicial discretion as the basis for the court's refusal to compel the issuance of a building permit in this situation.[21] However,

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13 Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D. Va. 1932).

14 See generally Annot., 136 A.L.R. 844 (1942).

15 *Compare* Socony-Vacuum Oil Co. v. Mount Holly Township, 135 N.J.L. 112, 51 A.2d 19 (Sup.Ct. 1947) *with* A. J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954). In *Socony-Vacuum* no authority existed for failing to issue the permit because of the pending ordinance, but in *A. J. Aberman* authority did exist for such a refusal. See note 17, *infra.*

16 *In re* Hertrick's Appeal, 391 Pa. 148, 137 A.2d 310 (1958) (dictum); Shender v. Zoning Board of Adjustment, 388 Pa. 265, 131 A.2d 90 (1957); A. J. Aberman, Inc. v. City of New Kensington, *supra* note 15; Appeal of A. N. "Ab" Young Co., 360 Pa. 429, 61 A.2d 839 (1948); Gold v. Building Comm. of Warren Borough, 334 Pa. 10, 5 A.2d 367 (1939).

17 "[T]he City's refusal of the appellant's application for a building permit could have been sustained on the ground of the pendency of the comprehensive zoning ordinance then before council." A. J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586 (1954).

18 Kline v. City of Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949) as explained in A. J. Aberman, Inc. v. City of New Kensington, *supra* note 17, at 590; Herskovits v. Irwin, 299 Pa. 155, 149 Atl. 195 (1930). Just what constitutes a "pending" ordinance so as to put the applicant on actual or constructive notice of the change of the official mind is difficult to ascertain. *Compare* A. J. Aberman, Inc. v. City of New Kensington, *supra, with* Herskovits v. Irwin, *supra.*

19 *Cf.* Appeal of A. N. "Ab" Young Co., 360 Pa. 429, 61 A.2d 839 (1948).

20 A. J. Aberman, Inc. v. City of New Kensington, 377 Pa. 520, 105 A.2d 586, 589-90 (1954).

21 Gold v. Building Comm. of Warren Borough, 334 Pa. 10, 5 A.2d 367 (1939).

the underlying but unspoken reasoning behind this rule appears to be that an applicant, put on notice by the pending ordinance, is estopped from circumventing a valid exercise of the police power by taking advantage of the fact that zoning ordinances cannot be proposed and enacted overnight. That this notice of pending legislation is decisive is apparent from Pennsylvania's rejection of the suggestion that a permit can be denied on the basis of laws proposed and enacted after application for the permit.[22] In this latter situation, the element of advance notice is absent.[23]

Acceptance of the rule that building permits may be authoritatively denied on the basis of pending legislation has apparently been limited to Pennsylvania. The suggestion that such a right should exist has been expressly rejected by another court.[24] However, the underlying idea of estoppel arising out of the notice given to an applicant by the pendency of an ordinance prohibiting his intended use has found acceptance elsewhere. Thus in *Sharrow v. City of Dania*[25] the court held that a municipality could enforce a newly-enacted zoning ordinance against a holder of a building permit who had knowledge of the ordinance when it was pending, but who disregarded it and built according to the existing law. The court concluded that if the holder of the permit had obtained a vested right thereto,

> [S]uch vesting was subject to warning evidenced by the ordinance pending on first reading and, therefore, subject to the ultimately completed exercise of the police power which was signaled by the pending ordinance.
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> This was not a case of sudden unexpected arbitrary action by the public officials. Here the permittee was fully on notice that the City was proceeding to exercise its police power which ultimately emerged in the adoption of the ordinance on the third reading. . . . [U]nder appropriate circumstances the doctrine of equitable estoppel may be applied against a municipality but . . . such cases are not to be compared with those similar to the one at bar where the party claiming to have been injured by relying upon an official determination had *good reason* to believe before or while acting to his detriment that the official mind would soon change.[26] (Emphasis added).

In *Huff v. City of Des Moines*,[27] the plaintiffs urged that construction done by them estopped the city from revoking their permit. The court rejected this argument, stating:

> Almost from the date of the building permit, . . . and well prior to any change in the ordinance, appellants knew steps were being taken to restrict, if not prohibit, the construction of the [trailer] park. In the face of this they deliberately went ahead with their project. We find no vested rights in appellants nor equitable circumstances which would warrant a court of equity in granting the relief asked, assuming that the new ordinance is valid.[28]

These two quoted decisions indicate that a person who acts in known disregard of a pending change of the official mind may be held to have done so at his peril. The fact that he was forewarned will estop him from complaining against its enforcement.

The Pennsylvania rule, which grants municipalities authority to deny permits not conforming to pending legislation, provides the means of protecting the public welfare during the pendency of a zoning ordinance and eliminates the necessity for arbitrary action in achieving this result. However, it is not entirely free of dangers. An applicant would be arbitrarily deprived of his rights if his permit were denied on the basis of a pending ordinance which was not later enacted within a reasonable time. Nor is it evident what period of time would constitute a reasonable time. Furthermore, no means of recovering losses sustained in such a situation is apparent. However, these problems have not as yet arisen.

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22 Shapiro v. Zoning Board of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954); Herskovits v. Irwin, 299 Pa. 155, 149 Atl. 195 (1930); *cf.* Lened Homes Inc. v. Department of Licenses and Inspections of the City of Philadelphia, 386 Pa. 50, 123 A.2d 406 (1956).

23 In *Shapiro v. Zoning Board of Adjustment, supra* note 22, at 303, the court distinguishes this later situation from the first situation on the basis of the "good faith" of the applicant. This "good faith" is of necessity dependent upon the element of advance notice, either actual or constructive.

24 State *ex rel.* Waltz v. Village of Independence, 69 Ohio L. Abs. 445, 125 N.E.2d 911 (Ct. App. Ohio 1952).

25 83 So. 2d 274 (Fla. 1955).

26 *Id.* at 275-6.

27 244 Iowa 89, 56 N.W.2d 54 (1952).

28 *Id.* at 57.

The Pennsylvania Courts have granted municipalities the authority to dispose of the problem when it first arises. Courts of other states have ultimately reached the same result as Pennsylvania by refusing to compel, through application of the new law, the issuance of a permit which was arbitrarily refused the applicant in the first instance. Nevertheless, granting that a municipality must have some means of protecting the public welfare during the pendency of a zoning ordinance or building code, the rule developed in Pennsylvania is the simplest and most logical means to that end.

Legislation Proposed and Enacted After Application

Little difficulty is experienced in accepting the idea that a municipality should have the power to prevent circumvention of pending zoning ordinances and building codes by hurried applications for building permits. Greater difficulty is experienced at the suggestion that a municipality should have the power to propose and enact a law *after* application for a building permit and then deny the permit on the basis of the newly-enacted law.[29] This seems to be an obvious violation of traditional notions of fair play, if nothing else. A New Jersey Court recently addressed itself to this problem:

> Nor does the fact that the particular application for the use reveals the need for the new zoning regulation and provides the incentive for its passage derogate against the effectiveness of the regulation as against the proposed use.[30]

This was, however, merely a restatement of an earlier opinion by Justice Brennan of the United States Supreme Court, then a judge of the superior court, appellate division:

> Plaintiffs argue finally that the ordinance must be struck down because the proofs show it was hurriedly adopted for specific purpose of preventing their vendee from carrying out its known plan to construct the apartment building. Doubtless the filing of the vendee's plot plan brought the issue to a head. It is evident, however, that the ordinance is in every respect valid, and in such case, the law prevailing at the time of filing of the plot plan is an immaterial consideration. . . . Manifestly the ordinance would not be invalid merely because of the circumstance that the vendee's action gave incentive to its passage.[31]

The source of such a power in a municipality to deny a permit on the basis of a law proposed and enacted after the permit application is the police power of the state.[32] The right of a citizen to use his property as he wishes is subject always to the police power of the state. Consequently, new burdens may be imposed upon property and new restrictions placed upon its use according to the felt needs of the public welfare.[33] It is this dominant consideration of the community which overrides any real or imagined right that might exist in an individual to have his application for a permit determined by the law existing at the time of application.

Any zoning ordinance which is not based on the public welfare will be declared invalid as an arbitrary and unreasonable exercise of the police power.[34] The power to deny permits on the basis of laws proposed and enacted after the permits were applied for is also based upon the same police power.[35] It follows that an ordinance valid in other respects as a reasonable exercise of the police power would thereby overcome any objection that it was enacted to prohibit a specific use applied for prior to its enactment.

The suggestion of such a power in a municipality has been rejected by some courts.[36] In Pennsylvania such legislation has been termed "special" and declared in-

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29 The Iowa court has determined that a municipality should have the power to revoke a permit for a use which does not conform to a law, proposed and enacted *after the permit was issued.* The existence of the proposal prevents the permittee from vesting his rights under the permit by substantially changing his position before the new law is enacted. This decision goes even further than the cases herein discussed in giving effect to a subsequently proposed and enacted law. Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952).

30 Roselle v. Mayor of Moonachie, 49 N.J.Super. 35, 139 A.2d 42, 45 (App.Div. 1958).

31 Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435, 440 (App.Div. 1951).

32 Roselle v. Mayor of Moonachie, 49 N.J.Super. 35, 139 A.2d 42, 45 (App.Div. 1958).

33 Trust Co. v. City of Chicago, 408 Ill. 91, 96 N.E.2d 499, 503 (1951).

34 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

35 See note 32, *supra.*

36 State *ex rel.* Waltz v. Village of Independence, 69 Ohio L. Abs. 445, 125 N.E.2d 911 (Ct. App. Ohio 1952). It is difficult to ascertain just what is the basis of this decision. The court simply states

valid under the Pennsylvania Constitution.[37] However, the general view is that such legislation is not special and that "the mere right under existing laws and ordinances to make a particular use of property at the time of application for a permit does not immunize the owner from valid subsequently adopted legislation, state or municipal."[38]

The Affect of Subsequently-Enacted Legislation: New Jersey as an Example

New Jersey offers fertile ground for analysis where the denial of a permit is based on legislation proposed and enacted after the application was filed. In *Rohrs v. Zabriskie,*[39] the New Jersey Supreme Court met the problem for the first time. The court somewhat summarily concluded:

> Assuming that the ground upon which the superintendent [of buildings] refused to issue the permit was unsubstantial and that the action of the board of adjustment [in refusing the permit] was not justified under the statute, will this court, when confronted with an ordinance passed in the valid exercise of the police power conferred upon the municipality, disregard its existence and direct a permit to be granted to . . . [the plaintiff] to erect a building of the character described in her application, although its erection will be a threat to the public safety, merely for the reason that such ordinance was not passed until after the conclusion of the hearing before the board of adjustment and its action thereon. We have no doubt that this question should be answered in the negative. . . . The power to issue a writ of mandamus is a discretionary one . . . , and it would be an abuse of that power for this court to direct the municipality to grant a permit for the erection of a building the existence of which, if erected, has already been declared by legal authority to be a menace to the safety of the community.[40]

This decision was uniformly followed for a number of years.[41] Then in *Vine v. Zabriskie,*[42] a case involving the same superintendent of buildings and the same municipality, the *Rohrs* decision was rejected without mention. In this case, when it became known that the plaintiff planned to erect an apartment building, a number of petitions of protest were filed with the city commissioners. Then on the eve of the meeting to consider the plaintiff's application for a building permit an amending ordinance prohibiting apartment houses was written and first read. The permit was refused and the amending ordinance was enacted soon after. The court condemned the actions of the

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that Ohio law prohibits a municipality from refusing to issue a permit for use which does not conform to pending legislation, citing State *ex rel.* Fairmount Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777 (1941). This case involved a "stop-gap" ordinance enacted contrary to the statutory procedures for enacting zoning ordinances. By way of dictum the court expressed two opinions that might be the basis for the decision in *Waltz.* The court first implied that OHIO CONST. art. II, § 28, which prohibits the General Assembly from enacting any retroactive law, might also apply to municipal legislative bodies. Secondly it stated that the retroactive effect of such a law would result in a deprivation of property rights without due process of law. However, mere retroactivity does not render a law unconstitutional. Rather its constitutionality must be determined apart from its retroactive character. Combs v. United States, 98 F.Supp. 749, 754 (D. Vt. 1951). This leaves only the suggestion in Fairmount that by implication the Ohio Constitution prohibits municipal legislatures from enacting retroactive laws as the basis of the *Waltz* decision.

As subdivisions of the state, municipalities should not have the power to enact a type of law prohibited to the state. *But see* Williams v. Village of Deer Park, 78 Ohio App. 231, 69 N.E.2d 536 (1946) where a later-enacted zoning ordinance was given retroactive effect.

37 Shapiro v. Zoning Board of Adjustment, 377 Pa. 621, 105 A.2d 299 (1954).

38 Roselle v. Mayor of Moonachie, 49 N.J.Super. 35, 139 A.2d 42, 45 (App. Div. 1958). *Accord,* Brougher v. Board of Public Works, 205 Cal. 426, 271 Pac. 487 (1928); Gay v. Mayor of Lyons, 212 Ga. 438, 93 S.E.2d 352 (1956); Ward v. Village of Elwood Park, 8 Ill.App.2d 37, 130 N.E.2d 287 (1955); Ware v. City of Wichita, 113 Kan. 153, 214 Pac. 99 (1923); Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S.W. 223 (1926); Caputo v. Board of Appeals of Somerville, 330 Mass. 107, 111 N.E.2d 674 (1953); Rohrs v. Zabriskie, 102 N.J.L. 473, 133 Atl. 65 (Sup.Ct. 1926); Haussman v. Oatley, 285 App.Div. 832, 137 N.Y.S.2d 41, 43 (App.Div. 1955); Gulf Refining Co. v. McKernan, 179 N.C. 314, 102 S.E. 505 (1920); Baxley v. City of Frederick, 133 Okla. 84, 271 Pac. 257 (1928); Berger v. City of Salem, 131 Ore. 674, 284 Pac. 273 (1930); Connor v. City of University Park, 142 S.W.2d 706 (Ct.Civ.App. Tex. 1940).

39 102 N.J.L. 473, 133 Atl. 65 (Sup.Ct. 1926).

40 *Id.* at 65.

41 Koplin v. Village of South Orange, 6 N.J.Misc. 489, 142 Atl. 235 (Sup.Ct. 1928); Adelmann v. Williams, 10 N.J.Misc. 312, 159 Atl. 148 (Sup.Ct. 1932); Builders' Constr. Co. v. Daly, 10 N.J.Misc. 861, 161 Atl. 189 (Sup.Ct. 1932).

42 Vine v. Zabriskie, 122 N.J.L. 4, 3 A.2d 886 (Sup.Ct. 1939).

municipality as an "eleventh-hour attempt to prevent . . . [the plaintiff] from using her property for its highest use and for which it had been zoned for seven years. . . ."[43]

The ordinance involved in *Vine* was certainly less of an "eleventh-hour attempt" than the ordinance enacted in the *Rohrs* case. The *Rohrs* ordinance was enacted after the plaintiff had been arbitrarily refused a permit by both the superintendent of buildings and the board of adjustment.[44] Despite the language of the court, which literally rejects the idea that a permit can be denied on the basis of an ordinance enacted after application, careful analysis of the *Vine* decision and its subsequent use[45] indicates that the court's real objection was to the amending ordinance itself, rather than to the time of enactment. No matter when a zoning ordinance is enacted, it must not violate guaranties of a personal or proprietary nature or other provisions of the federal and state constitutions when it is applied.[46] The amending ordinance involved in the *Vine* case was invalid as applied to the plaintiff not because of when it was enacted, but rather, because it was violative of the federal and state constitutions in that it attempted to zone out apartment buildings, an unreasonable act in light of the character of the surrounding area.

In the same year as the *Vine* decision, the Court of Errors and Appeals, in *Eastern Blvd. Corp. v. Willaredt*,[47] adopted the reasoning of the *Rohrs* decision with no mention of *Vine*. The court concluded that an amending ordinance prohibiting the plaintiff's intended use, proposed and enacted after the plaintiff's application for a building permit, was applicable to the plaintiff "if properly adopted and reasonable, [and] a bar to the issuance of a permit and a writ of mandamus therefor."[48]

Seemingly disregarding this and previous decisions, in 1946 the New Jersey Supreme Court in *Sgromolo v. City of Asbury Park*[49] granted a writ of mandamus to compel issuance of a permit despite the existence of an amending ordinance prohibiting the intended use. The court reasoned that the plaintiff had been entitled to the permit at the time his application fully complied with the existing law. Thus the amending ordinance was of no avail. Presuming that the applications involved in the earlier decisions were in order (otherwise the permits could have been denied on this basis alone, without resorting to the defense of a later-enacted law), it appears that the decision in *Sgromolo* is in direct conflict with the precedents existing at the time. However, certain overriding circumstances were involved in that case which limit its thrust as a possible break with established law. The plaintiff originally applied for his permit in May of 1944. The application was approved by the city council but the permit was not issued despite repeated requests by the plaintiff. A new council was elected and the plaintiff was directed to re-apply. This he did on June 8, 1945, and a third application was filed on September 21, 1945. He was again directed to make certain changes in his plans which he did, completing them on October 24, 1945. A law prohibiting his intended use was enacted on November 7, 1945, and the permit was finally denied.

It is readily apparent that the actions of the municipality were of an extreme nature. This was not a case of an amending ordinance enacted immediately after an application brought its need to the attention of the governing authority. A year and a half elapsed between the plaintiff's first application and the enactment of the amending ordinance. During this period the plaintiff complied with every request of the city to change his plans. This should be sufficient to raise an estoppel against the city and prevent it from pleading the later-enacted law. Thus the decision in *Sgromolo* should properly be con-

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43 *Id.* at 887.
44 Rohrs v. Zabriskie, 102 N.J.L. 473, 133 Atl. 65 (Sup.Ct. 1926).
45 For example, *Vine* is cited in Roselle v. Wright, 37 N.J.Super. 507, 117 A.2d 661, 668 (App.Div. 1955) *aff'd*, 21 N.J. 400, 122 A.2d 506 (1956), for the general proposition that a zoning ordinance, unreasonable in light of the prohibitions compared with the surrounding area, is invalid.
46 8 McQUILLIN, MUNICIPAL CORPORATIONS § 25.05 (3rd ed. 1957).
47 123 N.J.L. 269, 8 A.2d 688 (Ct. Err. & App. 1939).
48 *Id.* at 689.
49 134 N.J.L. 195, 46 A.2d 661 (Sup.Ct. 1946).

sidered with decisions from New York and Illinois involving a similar estoppel situation to be discussed below.

Regardless of any conflict that may have existed as to the proper law to apply in this situation, a 1947 New Jersey Supreme Court decision resolved the question.

> [T]here can no longer be any question as of the time when the status of the applicable law controls. It is neither the status of the law prevailing at the time of the application for the permit nor the status of the law prevailing at the time of the application or allowance of the rule to show cause. It is the status of the law prevailing at the time of the decision by the court that is controling. . . . And just as a change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation, as here, to a permit for the doing of a future act. Otherwise the administrative body . . . would issue a permit contrary to existing legislation. Cf. Ziffrin, Inc., v. United States, 318 U.S. 73.[50]

This decision has been uniformly followed up to the present time.[51] Thus the New Jersey rule now is that a municipality may propose and enact an ordinance after a person applies for a permit and deny this permit on the basis of the newly-enacted law. It makes no difference that at the time of application the intended use was not prohibited, nor was there pending legislation which pointed towards such prohibition.

The danger inherent in the New Jersey rule is aptly illustrated by the decision in *Sgromolo v. City of Asbury Park*. Strictly applied, it would allow a municipality to arbitrarily refuse to issue a permit or to simply fail to issue a permit within a reasonable time, and then, in the event that the applicant indicates that he is going to press the point by going to court, the municipality could amend the zoning ordinance so as to prohibit the applicant's intended use. Admittedly, the zoning ordinance as amended may be reasonable and constitutional. However, a municipality should not be allowed to exercise the police power in an arbitrary manner.

The New Jersey rule should be limited to the situation where application for a permit brings the need of a zoning ordinance prohibiting the intended use to the attention of the municipality, and the amending ordinance upon which the permit is denied is enacted within a reasonable time thereafter. The New Jersey courts have tacitly acknowledged this theory by failing to overrule *Sgromolo* in the *Socony* case. So limited, the rule allows a municipality to protect the public welfare by a reasonable exercise of the police power in a situation which in all probability was created by poor draftsmanship or lack of foresight in the original zoning ordinance or building code. When reasonably implemented, the considerations of the public welfare need not be subordinated to the opportunities of an applicant to take advantage of such poor draftsmanship or lack of foresight.

Revocation of Existing Permits — A Similar Problem

Closely analogous to the question involving the denial of permits on the basis of legislation proposed and enacted after application is the problem involving revocation of permits already issued on the basis of similar legislation. The issue is a basic one, for if the issuance of a permit vests no rights in the permit holder so that his permit may be revoked on the basis of subsequently-enacted law, it follows that mere application for a permit does not vest a similar right in an applicant.[52]

As a general rule, the issuance of a permit alone vests no rights in the permittee as against subsequent legislation prohibiting the intended use.[53] Rather, it is the issuance

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50 Socony-Vacuum Oil Co. v. Mount Holly Township, 135 N.J.L. 112, 51 A.2d 19, 23 (Sup.Ct. 1947).

51 Roselle v. Mayor of Moonachie, 48 N.J.Super. 17, 136 A.2d 773 (App.Div. 1957), *aff'd*, 49 N.J.Super. 35, 139 A.2d 42 (App.Div. 1958); Guaclides v. Borough of Englewood Cliffs, 11 N.J.Super. 405, 78 A.2d 435 (App.Div. 1951); Tice v. Borough of Woodcliff Lake, 12 N.J.Super. 20, 78 A.2d 825 (App.Div. 1951); Concord Garden Apartments v. Board of Adjustment of City of Englewood, 1 N.J.Super 301, 64 A.2d 355 (App.Div. 1949).

52 Brougher v. Board of Public Works, 205 Cal. 426, 271 Pac. 487, 490-91 (1928).

53 *E.g.*, Geneva Investment Co. v. City of St. Louis, 87 F.2d 83, 89 (8th Cir.), *cert. denied*, 301 U.S. 692 (1937).

of the permit coupled with a substantial change of position by the permittee in reliance thereon that vests the right to complete the building.[54] However, the expenditures, construction, or obligations incurred which vest such a right must not only be substantial,[55] but they must also occur after the permit is issued.[56] Since it is a matter of common knowledge that a permit is necessary before construction may begin,[57] illegal construction prior to the issuance of a permit should never go to establish a substantial change of position.

It has been held that mere excavation,[58] pouring of footings,[59] or laying of pipes and sewers[60] in reliance upon a building permit do not constitute a substantial change of position. However, where all three of these things had been done prior to enactment of the new law,[61] or where expenditures totaling approximately one seventh of the projected cost of the building had been incurred a substantial change of position has been found.[62] The degree to which a person must change his position in order to prevent revocation of a permit already issued when the law is changed magnifies the difficulty which would be involved in attempting to maintain an argument that the normal expenditures incurred in applying for a permit, such as the expense of plans and surveys, should constitute a change of position sufficient to vest a right in an applicant to a permit if his intended use complies with the law existing at the time of application.

The revocation of permits already issued on the basis of subsequently-enacted legislation is a greater limitation on the right of an individual to use his property than is the mere denial of a permit in the first instance on the basis of similar legislation. Most likely this authority to revoke issued permits often precipitates a race between the permittee and the municipality with the permittee attempting to substantially complete his building before the municipality changes the law. This is certainly not a situation to be fostered. Why was the permit issued in the first place if a change of the official mind was contemplated? There is a growing need for a defined right in municipalities which allows them to deny permits for uses contrary to legislation pending at the time of application or for uses prohibited by legislation proposed and enacted immediately after the time of application.

Permits Granted Despite Subsequent Legislation

It has been seen that under the general rule an application for a permit vests no rights in the applicant so as to immunize him from subsequently enacted legislation. Nor does the bringing of suit in an effort to obtain the permit vest any right in the applicant to have his right to the permit determined under the law existing at the time the action was initiated.[63] As stated by the Georgia Supreme Court:

> [M]andamus directing the issuance of a building permit will be refused notwithstanding the application for the permit was made prior to the adoption of the zoning ordinance prohibiting the contemplated structure, and even though the ordinance was enacted after the institution of a mandamus proceeding to compel the issuance of the permit.[64]

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54 See cases cited in note 9, *supra.*

55 Graham Corp. v. Board of Zoning Appeals of Town of Greenwich, 140 Conn. 1, 97 A.2d 564 (1953); Appeal of Dunlap, 370 Pa. 31, 87 A.2d 299 (1952).

56 City of Harrisburg v. Pass, 372 Pa. 318, 93 A.2d 447 (1953); Atlas v. Dick, 275 App.Div. 670, 86 N.Y.S.2d 231, aff'd, 299 N.Y. 654, 87 N.E.2d 55 (1949).

57 See City of Harrisburg v. Pass, *supra* note 56, at 449.

58 Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 363 (1953).

59 Graham Corp. v. Board of Zoning Appeals of Town of Greenwich, 140 Conn. 1, 97 A.2d 564 (1953).

60 Appeal of Dunlap, 370 Pa. 31, 87 A.2d 299 (1952).

61 Deer Park Civic Ass'n v. City of Chicago, 347 Ill.App. 346, 106 N.E.2d 823 (1952).

62 Miller v. Dassler, 155 N.Y.S.2d 975, 978 (Sup.Ct. 1956).

63 Socony-Vacuum Oil Co. v. Mount Holly Township, 135 N.J.L. 112, 51 A.2d 19 (Sup.Ct. 1947). This case discards by implication dictum in Builders' Constr. Co. v. Daly, 10 N.J. Misc. 861, 161 Atl. 189 (Sup.Ct. 1932) to the effect that the law at the time of the application for the writ of mandamus controls.

64 Gay v. Mayor of Lyons, 212 Ga. 438, 93 S.E.2d 352, 354 (1956). *Accord,* Wheat v. Barrett, 210 Cal. 193, 290 Pac. 1033 (1930); Cayce v. City of Hopkinsville, 217 Ky. 135, 289 S.W. 223 (1926).

However, a rule of law has evolved which, when applicable, will result in the courts affirming issuance of a permit despite the existence of legislation prohibiting the intended use at the time of the decision.

In *Dubow v. Ross*[65] a New York court determined that a writ of mandamus compelling issuance of a permit would be granted[66] despite subsequent legislation

> if it be found that the public officials charged with the duty of issuing permits willfully withheld and refused to issue one to petitioner, and, in addition, misled and hindered him, to the end that, if they had acted with reasonable promptness, his permit would have been granted and he could have conducted his business so as to acquire a vested right prior to the amendment of the zoning ordinance. . . .[67]

It appears that the unacknowledged acceptance of similar reasoning determined the decision in *Sgromolo v. City of Asbury Park*, which is contrary to a strict application of the New Jersey rule.[68]

Recent acceptance of this rule occurred in *Phillips Petroleum Co. v. City of Park Ridge*.[69] In this case the municipality enacted a patently invalid resolution in an attempt to prohibit the applicant's intended use. Only after the plaintiff began court proceedings to contest this arbitrary action did the municipality propose and enact an amending ordinance. The Illinois Appellate Court concluded:

> It would be a strange perversion of the law to hold that the defendants could now take advantage of their own wrong and in effect say that by virtue of the subsequent amendatory ordinance the plaintiff could now be prevented from building and operating a filling station since it had not taken any steps under which it could have acquired a vested right, when the reason it had not was because it was prevented from acting by the invalid resolution passed by the city council.[70]

The New York rule prevents the dangers inherent in a strict application of the New Jersey rule. It necessitates the reasonable exercise by a municipality of the power to deny a permit on the basis of a law proposed and enacted after application for a permit was made. Thus a municipality, faced with an application for a permit to erect a building which is constitutionally within its power to prohibit in the particular location, must amend or enact a zoning ordinance prohibiting the intended use within a reasonable time according to lawfully designated procedures if it wishes to deny the permit on the basis of this later-enacted law.

Conclusion

Achievement of the goal of zoning ordinances and building codes — namely, advancement of the public health, morals and welfare — without unduly interfering with the rights of an individual to use his property as he wishes, is possible by adoption of the rules developed in Pennsylvania, New Jersey and New York. When a municipality proposes a more restrictive zoning ordinance or building code, it must of necessity have the means of insuring that its efforts will not be reduced to "locking the door after the horse is stolen." The Pennsylvania rule, which gives the municipality the authority in the first instance to deny a permit for a use which does not conform to legislation pending at the time of application as long as the legislation is subsequently enacted, supplies this means simply and logically. When a municipality is faced with an application to

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65 254 App.Div. 706, 3 N.Y.S.2d 862 (1938).

66 It is interesting to note the suggestion in the dissenting opinion in *Dubow v. Ross, supra* note 65, at 864 that even if the arbitrary actions of the municipality have prevented the plaintiff from obtaining a vested right, the remedy is not mandamus compelling the issuance of a permit to erect a building that would violate the presently existing ordinance, but rather the remedy should be an action against the officials free from the element of futility (presumably for money damages for losses sustained as a result of the arbitrary action). Such a remedy, however, would allow a municipality to benefit from their arbitrary action to the degree that the applicant is still ultimately prevented from using his property for the purpose for which he applied for the permit.

67 Dubow v. Ross, 254 App.Div. 706, 3 N.Y.S.2d 862, 863-64 (1938).

68 *Compare* Munns v. Stenman, 152 Cal.App.2d 543, 314 P.2d 67 (Dist.Ct.App. 1957) *with* Brougher v. Board of Public Works, 205 Cal. 426, 271 Pac. 487 (1928). In *Brougher* the court gave all indications of accepting a rule substantially the same as the rule in New Jersey. However, in *Munns* the court adopted a limitation similar to that of *Sgromolo*.

69 16 Ill.App.2d 555, 149 N.E.2d 344 (1958).

70 *Id.* at 350.

erect a building which would have been prohibited in the particular location had it not been for an element of human error or lack of foresight which influenced the drafting of the existing ordinances, it must have the means of rectifying this error if the goal of such ordinances is to be achieved. The New Jersey rule, which allows a municipality to propose and enact an amendatory zoning ordinance or building code after application for a permit has been made and then deny the permit on the basis of the new law, insures that the goal set out above will be achieved despite the human element of error. However, the power granted a municipality by the New Jersey rule, should be tempered by moderate application. The New York rule, which provides that issuance of a permit will be compelled by the courts despite legislation existing at the time of decision prohibiting the intended use if the applicant could have obtained a vested right had it not been for the arbitrary actions of the municipality, insures that this power will not be used arbitrarily.

All zoning ordinances and building codes enacted subsequent to an application for a permit, and which are in one way or another the basis for the permit's denial, are still exercises of the police power. Consequently, they must be reasonable. Only careful examination by the courts of these ordinances in an effort to determine the reasonableness of the restrictions they contain, will insure that the above-detailed powers will be used as instruments to achieve the advancement of the public health, morals and welfare, and not as instruments of public whim and caprice.

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